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No. 76-1202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL UNION NO. 388

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 76-1868

IN THE

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NATIONAL LABOR RELATIONS BOARD,
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v.

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LOCAL UNION NO. 388

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Respondent Union opposes the petition for certiorari for the reasons to be presented.

QUESTION PRESENTED

Whether the ten-day notice of picketing provision of § 8(g) of the NLRA is applicable to an informational area-standards picket directed by a building trades labor organization not representing hospital employees exclusively at its primary disputant electrical contractor, where that contract is performing work on

a construction site on hospital grounds, but where it was neither the purpose nor the effect of the picket to interrupt the ongoing health-care services of the adjacent hospital?

STATEMENT OF THE CASE

Petitioner's Statement is generally satisfactory to Respondent Union. However, we do wish to emphasize the stipulated fact that Respondent's picket was neither designed to nor effected any interruption or attempt at interruption of the health-care delivery operation of St. Joseph's Hospital. (Pet. App. A, pp. 3a-4a, 6a & n. 5; Pet. App. C, p. 26a; Stip. of Parties, App. in 7th Cir. at pp. 11-12, ¶¶ 8(a)(i), 8(c) & Ex. F.)

REASONS FOR DENYING THE WRIT

Introduction

The decision of the court below, because the first by a federal court respecting the scope of the applicability of Section 8(g), presents no conflict of federal judicial authority.[1] The case, involving an area standards picket of a construction site adjacent to the hospital, neither the object nor effect of which picket was to disrupt hospital operations, presents a narrow set of facts frankly inappropriate to accomplish Petitioner's larger purpose: a test of the Board's premise that the Seventh Circuit's decision undermines the safeguards for continuous patient care Congress intended the notice requirement to provide. Nor does the case present an appropriate occasion to consider Petitioner's concern for the ongoing administration of the Act, because there is no question presented on this record as to ". . . the serious consequences to . . . striking employees of the union's failure to give the notice. . . ." (Br. of Pet., p. 7.) The court's decision, moreover, is a cautious, well-reasoned interpretation of both statutory language and egislative history, which accords with the general rule of construction derived from Section 13 of the Act,[2] to construe picketing restrictions narrowly and, in the

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[1] See the opinion of the court below (Pet. App. A, p. 5a). The Board has also decided two similar cases, *United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg)*, 219 NLRB 837 (Pet. App. D, pp. 32a-57a), and *Laborers' International Union of North America, AFL-CIO, Local Union No. 1057 (Mercy Hospital of Laredo)*, 219 NLRB 846 (Pet. App. D, pp. 58a-63a), which are currently before the Court of Appeals for the District of Columbia on review (Nos. 75-1854 and 75-1859).

[2] Section 13, 29 U.S.C. § 163, provides as follows:

> "Nothing in this subchapter except as specifically provided for herein shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right."

Picketing has been equated with striking for purposes of Section 13. *NLRB v. Drivers Local Union*, 362 U.S. 274 (1960).

absence of an explicit, unambiguous limitation, to preserve pre-existing picketing rights. See *NLRB v. Drivers Local Union*, 362 U.S. 274 (1960). Review, therefore, is not warranted.

1. Petitioner premises its argument for review upon a purported potential for disruption of patient care arising from the court's decision applying the notice requirement of Section 8(g) only to unions representing health care institution employees. The instant case, however, does not present a fact situation to support Petitioner's concern.[3] The building trades picket in question was directed at a construction site electrical contractor rather than the adjacent hospital, and health care service was neither intended to be nor in fact disrupted. Furthermore, insofar as Petitioner contends that one of the factors establishing the importance of reviewing this case is the possible loss of employee status under the Act which threatens an employee engaging in a strike or picket without notice,[4] neither does the instant case, by contrast to the *Mercy Hospital* case (Pet. App. D, pp. 42a, 45a, 56a), involve such a fact situation.

Nor did the court's decision extend any further than to exempt labor organizations acting on behalf of workers not arguably covered as employees of a health care institution, as that term is defined in the newly added Section 2(14), for the court expressly did not reach the issue of "whether employees engaged in work activities necessary to the present operation of a health care institution, but not employed directly by the

[3] Whether the *Lein-Steenberg* and *Mercy Hospital of Laredo* cases are here pertinent, because the Board's decision in the instant case followed those preceding decisions and incorporated their reasoning by reference (Pet. App. C, pp. 26a-27a), is uncertain, for those cases involve disputed facts and summary procedures. (Pet. App. D, pp. 43a and n. 14, 43a-45a, 57a, 59a-63a.)

[4] Section 8(d) of the Act, 29 U.S.C. 158(d), provides, *inter alia*, that any employee who engages in a strike within the 8(g) notice period shall lose his status as an employee for purposes of Sections 8, 9 and 10 of the Act. (See Pet. App. E, pp. 65a-66a.)

institution, should be deemed health care employees." (Pet. App. A, p. 6a, n. 5). This latter issue, concerning, for example, employees of concessionaires within the hospital or of outside contractors regularly servicing hospital facilities or performing patient care related operations, whose economic actions more foreseeably threaten the interference with health care delivery Congress sought to prevent, cannot be adequately considered on the basis of this record. Yet Petitioner in effect seeks to raise that issue as well through its Petition in this case.

Moreover, the issue narrowly presented by this case is itself insufficiently judicially developed, because, not only is there no conflict between Circuits, but also there has not been any other federal judicial decision respecting the scope of Section 8(g). Surely, in the absence of such other court decisions and a broader range of opinion and analysis—the issue is not ripe for review.

2. The Seventh Circuit's decision is correct for, in light of what it found to be equivocal language and at best an ambiguous legislative record, it complies with the declared rule of construction where picketing rights are implicated, to resolve doubts in favor of the rights as understood prior to passage of the statutory provision. Although, as the court itself acknowledged, the Board properly identified the prophylactic purposes Congress intended Section 8(g) to serve, in applying the provision to this case the Court correctly looked beyond the statutory language *in vacuo* and found no clear expression of congressional intent "to extend the increased regulation of Section 8(g) to areas of labor activity that did not pose such increased danger as a result of the enactment of the hospital amendments" (Pet. App. A, p. 18a).

The legitimacy of resort to labor's traditional economic weapons, the strike and the picket, underlays the entire statutory scheme of the Act. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Motor Coach Employees v. Missouri*, 374

U.S. 74 (1963). The right to engage in a strike or peaceful picket has, therefore, been recognized and preserved in Section 13; and that section has been deemed to govern the interpretation of all other sections of the Act:[5]

> "§ 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively either from the structure or history of the statute; therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."

This Court, recognizing Congress' solicitude for peaceful picketing as a traditional economic weapon, has translated that perception into the interpretive principle "[not to ascribe] to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' that Congress intended to do so as regards the particular ends of the picketing under review." *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 63 (1964), (popularly known as "*Tree Fruits*" and hereinafter so referred to). In light of that principle the Court below properly found that the lack of any reference to non-health care employees in debates or hearings required a narrow reading of the statute (Pet. App. A, p. 12a).

At the outset of its critique of the Court's decision, Petitioner reasserts the Board majority's "plain-meaning" argument, set forth in the *Lein-Steenberg* decision, that, read literally, Section 8(g) proscribes any strike or picket at the premises of a health care institution. The Court, by contrast, found the language "equivocal" (Pet. App. A, p. 7a). The facts that the *Lein-*

[5] *NLRB v. Drivers Local Union*, 362 U.S. 274, 282 (1960).

Steenberg case was decided by a 3-2 majority and that a substantial portion of the dissenting members' opinion was devoted to a close morphological analysis of the statutory language (Pet. App. D, pp. 46a-49a), should be sufficient to support the court's conclusion. Additionally, it should be noted that the Board majority itself had to interpolate the language "at the premises of" in order to achieve its propounded formula for applying Section 8(g) (Pet. App. D, p. 39a).[6] Ultimately, indeed notwithstanding the merits of any of the readings of the language of Section 8(g), the Court wisely turned to an examination of the legislative history, for this Court has previously noted the particular inappropriateness of a plain-meaning interpretation for construing national labor law, especially that concerning labor's preferred picketing rights. *National Woodwork Manufacturers v. NLRB*, 386 U.S. 612 (1967); *Tree Fruits, supra.*

With regard to the legislative history concerning the scope of Section 8(g), Petitioner only points to generalized references to types of picketing in order to support its contention that the legislative history is "replete" with statements supporting the Board's position that Section 8(g) notice is required prior to *any* picketing.[7]

[6] While the Court did not address itself to the "premises" concept except in analyzing the meaning of the language, Petitioner does argue that that concept establishes a clear formula for administering the notice requirement. It is, however, disputable whether or not the purportedly clarifying "premises" concept is in fact itself a workable standard, see, e.g., the dissenting opinion, n. 17, Pet. App. D, p. 46a. Moreover, the majority's formula creates a *per se* rule for determining unfair labor practice liability in contravention of Section 8(c) of the Act and picketing law generally, which proscribes imposing liability in the absence of an unlawful object. See *IBEW, Local 501 v. NLRB*, 341 U.S. 694, 704 (1951); *Tree Fruits, supra*, 377 U.S. at 63.

[7] The legislative hearings and debate which both the Court and Petitioner discuss concerned S. 3203, 93rd Cong., 2d Sess., enacted as Public Law 93-360, July 26, 1974. Petitioner, however, also alludes to a preceding bill, S. 2292, 93rd Cong., 1st Sess. (1973), to bolster its argument that "any picketing of any kind . . . at the

By contrast, the only express references to work stoppages concerned those which had involved employees of the health care institutions. See, e.g., 120 Cong. Rec. S. 6932, S. 6934, S. 6964, H. 4588, H. 4589, H. 4590, H. 4595 (1974). Additionally, as the Court noted, the fact that no representative of the building trades, nor indeed of any labor organization not representing employees within the health care industry, testified in congressional hearings should be taken as concrete evidence of the narrow focus of the amendments (Pet. App. A., pp. 13a-14a). Indeed, it is inconceivable, as the dissenting Board members observed, that Congress could have intended to circumscribe construction site picketing without commenting on the substantial body of labor law which has developed respecting common situs picketing.[8] Thus a lack of any reference whatsoever to any

premises of a health care institution" fell within the notice requirement. (Pet. Brief, p. 14, fn. 13). Perhaps the most telling rebuttal to this argument is to recognize that following the Board's decision in *Lein-Steenberg*, and *Mercy Hospital*, the sponsor of this original formulation, Senator Taft, stated that the Board majority had in fact been mistaken in construing Section 8(g) to cover than health care employees:

> ". . . as far as I am concerned, this interpretation is incorrect since it was not my intention in introducing the hospital bill to change the law with respect to the relationship between employees who were previously covered by the Act and the employees and union representatives seeking to represent those employees.
>
> . . . .
>
> Nor were those words 'at the site' used in the amendment intended to expand the provision beyond the health care industry." 121 Cong. Rec. S. 20466 (daily ed., Nov. 19, 1975); to the same effect also the remarks of Sen. Williams, the Chairman of the Senate Committee on Labor and Public Welfare, 121 Cong. Rec. S. 20466 (daily ed., Nov. 19, 1975) and Rep. Thompson, 121 Cong. Rec. H. 12311 (daily ed., Dec. 11, 1975).

While scrupulous caution should be exercised in considering such later comment, subsequent legislative history can provide a useful reflection on an earlier Congress' intention. *Pipefitters v. U.S.*, 407 U.S. 385 (1972). See Pet. App. A, p. 16a, fn. 13 to the same effect.

[8] See e.g. *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 27 LRRM 1108 (1950); *Steelworkers v. NLRB*, 376 U.S. 492 (1964); *Local 761, I.U.E. v. NLRB*, 366 U.S. 667 (1961). Moreover, given this voluminous body of litigation in which drawing lines "more nice than obvious" respecting the locus of picketing has figured so critically, *Local 761, I.U.E.*, 366 U.S. 674, it is unreasonable to imagine the Congress could have intended a standard of coverage, such as that propounded by the Board, in which mere location was the sole and definitive criterion.

strikes, picketing or work refusals by employees other than those in the industry indicates that such a problem was not among the "isolated evils" to which congressional action had been addressed. *Tree Fruits, supra.*

The primary purpose of the health care amendments taken as a whole was to bring non-profit health care industry employees within the scope of federal labor law.[9] That class of employees had been specifically exempted from coverage under the Taft-Hartley Act, but increasing organizational activity among health care industry employees, including particularly increased strike activity, had provoked attempts to amend the Act.[10] The focus of the amendments was so plainly upon the employer-employee relationship within the health care industry that the Court below could firmly declare it "neatly consistent with the overall purpose of extending the protection of the National Labor Relations Act to employees of health care institutions to read this section as an attempt to regulate the newly protected concerted activity of such employees in order to alleviate any disruption of health care resulting from such activity. . . .[but not] activity already protected by the Act prior to passage of the health care institutions amendments." (Pet. App. A, p. 10a) Given a legislative record "pregnant with silence" as regards non-health care employees, Section 13 proscribed the Court from concluding otherwise.

[9] Sen. Rpt. 3948.

[10] 120 Cong. Rec. H. 4587 (daily ed. May 30, 1974) Remarks of Representative Thompson, Chairman of the House Subcommittee on Labor.

Petitioner also argues that the Court ought to have deferred to the Board's contemporaneous construction of the 1974 amendments to the Act. The Court, however, correctly asserted its independent responsibility to construe statutory language (Pet. App. A, 6a), particularly, where, as here, the administrative decision appeared inconsistent with the underlying congressional policy respecting economic weapons such as picketing rights. See *NLRB v. Brown*, 380 U.S. 278 (1965); *American Ship Building Co. v. Labor Board*, 380 U.S. 300 (1965); see also *Volkswagenwerk Akteingesesllschaft v. FMC*, 390 U.S. 261.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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